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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

INDIANA LUMBERMENS MUTUAL
INSURANCE COMPANY,

Defendant and Appellant.

G042748

(Super. Ct. No. 08CF1227)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Erick L. Larsh, Judge. Affirmed.

Nunez & Bernstein, E. Alan Nunez, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Nicole M. Walsh, Deputy County Counsel, for Plaintiff and Respondent.

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Defendant Indiana Lumbers Mutual Insurance Company (Surety) moved the court for an order tolling the 180-day bail forfeiture vacation period pursuant to Penal Code section 1305, subdivision (e) (section 1305(e)).¹ The court denied the motion and entered summary judgment for the People. Surety asserts that the court erred in denying the motion because the criminal defendant had been temporarily disabled by his detention by Mexican authorities. Alternatively, Surety asserts the court should have tolled the period on equitable principles. We disagree with both claims, and affirm.

FACTS

Surety posted bond for \$500,000 on behalf of criminal defendant Martin Sanchez on April 22, 2008. Sanchez failed to appear in court as required on May 20, 2008. The court ordered the bond forfeited in open court, and sent notice of the forfeiture to the Surety and the bail agent (no longer a party). On the bail agent's motion, the court extended the initial 180-day forfeiture vacation period by another 180 days, to June 18, 2009.

Evidently, Sanchez had fled the country. Nine days before the forfeiture period expired, authorities in the Mexican town of Xochimilco arrested Sanchez on assault charges. A criminal court judge in Mexico City ordered Sanchez to remain within the town of Xochimilco while the legal process was pending, and required him to check in with authorities every Friday during that time.

A Santa Ana Police Department detective informed Surety and the bail agent, in an e-mail on June 10, 2009, that Sanchez was in custody in Mexico. On June 25, 2009, Surety and the bail agent filed a motion to toll the forfeiture period pursuant to section 1305(e). Surety and the bail agent contended that Sanchez was temporarily

¹ All statutory references are to the Penal Code.

detained within the meaning of the statute or, alternatively, that the court should toll the period on equitable grounds. The court denied the motion to toll, and entered summary judgment for the People.

DISCUSSION

Relevant Statutory Law on Bail Exoneration

Once bail is posted, if a criminal defendant fails to appear in court, the court must declare the bail forfeited. (§ 1305, subd. (a).) Upon notice of the forfeiture, the surety generally has 180 days to locate defendant and, in most cases, bring him to court. (§ 1305, subd. (c)(1)-(3).) A surety, bail agent, or depositor may move for an extension of the initial 180 days, and the court may extend the initial period by up to 180 days. (§ 1305.4.)

Section 1305(e) governs the temporary disability of the defendant.² A defendant is temporarily disabled if, “by reason of illness, insanity, or detention by military or civil authorities” “the defendant is unable to appear in court during the remainder of the 180-day period” and “absence of the defendant is without the connivance of the bail.” (*Id.*, subd. (e)(1)-(3).) If defendant is temporarily disabled, the court shall order the tolling of the 180-day period until a reasonable time after the disability has ended. (§ 1305(e).) Surety’s statutory claim is that the restriction of

² Section 1305(e)(1)-(3) provides in full, “In the case of a temporary disability, the court shall order the tolling of the 180-day period provided in this section during the period of temporary disability, provided that it appears to the satisfaction of the court that the following conditions are met: [¶] (1) The defendant is temporarily disabled by reason of illness, insanity, or detention by military or civil authorities. [¶] (2) Based upon the temporary disability, the defendant is unable to appear in court during the remainder of the 180-day period. [¶] (3) The absence of the defendant is without the connivance of the bail. [¶] The period of the tolling shall be extended for a reasonable period of time, at the discretion of the court, after the cessation of the disability to allow for the return of the defendant to the jurisdiction of the court.”

Sanchez's movement to within the town of Xochimilco constituted a detention within the meaning of section 1305(e).

If the criminal defendant is in custody outside the court's jurisdiction, and the prosecutor elects not to extradite, the court shall exonerate the bond, "on terms that are just." (§ 1305, subd. (f).) Likewise, "where a defendant is not in custody and is beyond the jurisdiction of the state, is temporarily detained, by the bail agent, in the presence of a local law enforcement officer," and the prosecutor does not seek extradition, the court shall exonerate the bond on just terms. (*Id.*, subd. (g).) Surety's equitable argument turns on a legislative intent gleaned from the above two provisions, as well as a proposed amendment that was vetoed.

Sanchez Was Not Absent from Court "Based Upon" His Temporary Disability

The meaning of section 1305(e) is a pure question of law, subject to de novo review. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) Section 1305 is to be construed strictly, and to avoid forfeiture. (*People v. Wilshire Ins. Co.* (1975) 46 Cal.App.3d 216, 220.) It is "well settled that the law disfavors forfeitures, and that this disfavor extends to the forfeiture of bail." (*People v. Lexington National Ins. Corp.* (2010) 181 Cal.App.4th 1485, 1489.) "The standard of review, therefore, compels us to protect the surety, and more importantly the individual citizens who pledge to the surety" (*County of Los Angeles v. Surety Ins. Co.* (1984) 162 Cal.App.3d 58, 62.)

We review the court's application of relevant law under an abuse of discretion standard. Unless there appears on the record an abuse of discretion in the court's application of section 1305(e) or equitable principles, we must affirm the court's denial of the motion to toll. (*County of Orange v. Lexington Nat. Ins. Corp.* 140 Cal.App.4th 1488, 1491.) Thus, as long as there exists some reasonable or fairly

debatable legal justification for the court's decision, we must affirm the judgment. (*Gonzales v. Nork* (1978) 20 Cal.3d 500, 507.)

We presume the lower court is correct, and imply all findings necessary to support the judgment in favor of the People. (*In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 928.) In denying Surety's motion to toll the forfeiture period, the court necessarily found that Sanchez was not temporarily disabled within the meaning of section 1305(e). The court must have found at least one of the following: (1) Sanchez was not detained within the meaning of the statute; (2) the detention did not render him unable to appear within the 180-day period; or (3) his absence was with connivance of the bail. As there is no mention of the third finding in either party's briefs or the clerk's transcript, we do not address it.

Surety invites our attention to an interpretation of section 1305(e) in *People v. United Bonding Ins. Co.* (1970) 12 Cal.App.3d 349 (*United Bonding*), which defines detention within the meaning of the statute. The criminal defendant in *United Bonding* was in Mexico, where authorities restricted his movement to within 50 miles of a town. (*Id.* at p. 352.) The bail agent located defendant and brought him to the United States border. (*Ibid.*) There, Mexican authorities prevented the bail agent from bringing defendant across the border, citing the restriction of movement. (*Ibid.*) The court interpreted a prior version of section 1305 with language substantially similar to the current temporary disability provision. It held that defendant had been detained within the meaning of section 1305, and that the detention had rendered defendant unable to appear in court. (*United Bonding*, at p. 355.) "We do not consider proof of either physical custody or confinement in a jail a prerequisite to the grant of relief from a bail forfeiture under . . . section 1305. It is sufficient under this section to relieve from a bail forfeiture if it is proven that the defendant was restrained by civil authorities and that the restraint prevents his appearance on the date set for that appearance." (*Id.* at pp. 352-353.) That court further noted that the disability portion of the statute applied to

detention in foreign nations, as well as the United States, because the terms “‘civil’ or ‘military authorities’” was neither modified nor qualified by the Legislature. (*Id.* at p. 354.) The relevant language remains unchanged today, excepting that the current version reads “military or civil,” while the 1970 version read “civil or military.” (§ 1305(e).)

A more recent case, citing *United Bonding*, also held that section 1305(e) does not require physical custody or confinement. (*People v. American Surety Ins. Co.* (2000) 77 Cal.App.4th 1063, 1065-1066 (*American Surety*).) In that case, the criminal defendant was involuntarily deported from the United States. “He was not only ordered to leave the country, he was physically escorted across the border by federal agents.” (*Id.* at p. 1066.) The court held that the deportation was a detention that rendered defendant unable to return; [f]ederal statutes prevent[ed] both his voluntary return, and his forced return by Surety.” (*Ibid.*) It would have been a federal crime for the surety to bring him to court. (*Ibid.*)

In reaching its conclusion on the defendant’s detention, and whether it prevented his appearance, *American Surety* distinguished two other cases involving flight to foreign countries, and the operation of laws preventing the appearance of defendants in court. In *County of Los Angeles v. Ranger Ins. Co.* (1996) 48 Cal.App.4th 992 (*Ranger*), the criminal defendant voluntarily fled to Cuba, where the surety could not retrieve him because of travel restrictions. (*Id.* at p. 996.) The court found the surety’s claim “specious.” (*Ibid.*) The court reasoned it was not the travel restriction that prevented defendant’s return to court, but his voluntary escape of the country: “Cuba was just one of many places which defendant could flee to and be immune from surety’s agents. Such risks were present when the surety posted bond. [The County of Los Angeles] did not *act* to increase those risks.” (*Ibid.*) In *County of Los Angeles v. Maga* (1929) 97 Cal.App. 688 (*Maga*), the defendants voluntarily fled to Italy, and were retroactively deported under United States law. (*Id.* at pp. 690-691.) Although by operation of United States law defendants could not return, the court held that it was the voluntary flight, and not

operation of federal law, that prevented defendants from appearing. (*Id.* at pp. 691-692.) “[T]he fact that they had fled the jurisdiction following the issuance of the deportation warrant” did not “exonerate their sureties.” (*Id.* at p. 691.) “[N]o act of the federal authorities interfered with the right or power of the sureties to surrender their principals.” (*Id.* at p. 692.)

The People urge us to construe section 1305(e) to require physical custody for a detention and reject the approach adopted in *United Bonding*, *supra*, 12 Cal.App.3d 349, because (1) that case is old, and (2) section 1305 has since been amended. We disagree. If anything, the 40 years since *United Bonding* demonstrates that the Legislature had ample time to clarify the meaning of its words, if the court had interpreted the statute incorrectly. But the Legislature has not done so. Further, *United Bonding* has not been reversed or distinguished on this point, but has been applied recently. (*American Surety*, *supra*, 77 Cal.App.4th at p. 1065; *County of Orange v. Ranger Ins. Co.* (1998) 61 Cal.App.4th 795, 801.) The People are correct that the statute has been amended several times since 1970, when *United Bonding* was decided. However, the relevant language remains unchanged. (§ 1305(e).) *United Bonding* interpreted the meaning of “detention by civil or military authorities” within the context of the *permanent* disability section of the statute, while we are charged here with interpreting the same language as contained in the since added *temporary* disability section. The language characterizing permissible disabilities is the same in both provisions — “detention by military or civil authorities” — with the only substantive difference being that in subdivision (d) the disability must be permanent, while in subdivision (e) the disability is temporary and need only prevent defendant from appearing within the 180-day period. (§ 1305, subd. (d)-(e).) Thus, interpretation of the meaning of detention should be consistent between the two subdivisions (d) and (e).

We are to construe the statute to avoid forfeitures. It would not be consistent with the standard of review, or with the statutory scheme, to impose a physical

imprisonment requirement that would make tolling harder and forfeiture easier. The language of the statute plainly does not mention imprisonment or physical restraint. (*United Bonding, supra*, 12 Cal.App.3d at p. 352.) Instead, the facts of the cases above show that civil authorities can and do impose legal, but not physical, restrictions that prevent defendants from appearing in court. (See *American Surety, supra*, 77 Cal.App.4th at p. 1065.) However, the *Ranger* and *Maga* cases also point to instances where the initial cause of a defendant's absence is his voluntary flight and the operation of some law only *subsequently* exacerbates defendant's absence. In those cases, while there may be a detention, it is not the direct cause of the defendant's absence from court.

We accordingly construe section 1305(e) as follows. A detention occurs where civil authorities restrain a defendant, whether by physical apprehension or by force of law. A defendant is "temporarily disable[d] by reason of" the detention (§ 1305(e)(1)) when the operation of law is the direct cause of a defendant's failure to appear, such as where a defendant is forcibly deported from the United States by law (See *American Surety, supra*, 77 Cal.App.4th at p. 1065) or where foreign authorities explicitly forbid a surety from bringing the defendant across the border. (See *United Bonding, supra*, 12 Cal.App.3d at p. 352) However, a detention has not prevented the defendant's appearance under section 1305(e) when it merely buttresses the preexisting direct cause, such as where a defendant voluntarily flees to a country to which the bail agents cannot travel (See *Ranger, supra*, 48 Cal.App.4th at p. 996), or is deported in name only after he has already fled the country of his own volition. (See *Maga, supra*, 97 Cal.App. at p. 691.)

1. The Court Could Have Reasonably Rejected Surety's Evidence That Detention Prevented Sanchez's Appearance

We turn now to the question of whether the court below abused its discretion in denying Surety's motion to toll pursuant to section 1305(e). As stated above, the court necessarily found either that Sanchez was not detained or that the

detention did not prevent his appearance. We can assume without deciding that the court found Sanchez was detained under section 1305(e), given that the circumstances here closely match those of *United Bonding, supra*, 12 Cal.App.3d 349, which is the controlling case on the subject.

However, the court would not have abused its discretion by finding that Sanchez was not absent from court *based upon* the detention. The burden remains with Surety to show by competent evidence that Sanchez falls within the requirements of section 1305(e). (*United Bonding, supra*, 12 Cal.App.3d at p. 353.) That burden is a low one, given the statutory language, “appears to the satisfaction of the court” (§ 1305(e).) Citing cases that interpreted the word “appears” in other statutory contexts, *People v. Resolute Ins. Co.* (1975) 46 Cal.App.3d 249, 256-257, held that the surety must produce sufficient evidence of a rational appearance that the statutory requirements are met. (*Ibid.*) Still, *United Bonding* held that even undisputed evidence can be unconvincing. (*United Bonding, supra*, 12 Cal.App.3d at p. 352.)

Here, Surety provided the court with two pieces of “evidence” relating to the detention. First, it provided an *unauthenticated* e-mail, purportedly from a Santa Ana Police Department detective. The message is contained in a fax produced for someone named Jennifer at the Law Offices of Brendan Pegg (which does not represent Surety here or below), and includes two forwarded e-mails showing Sanchez’s status, confirmed by “my guy down there.” Second, Surety appears simply to have stapled to the end of its *reply brief* a series of Mexican police documents, with no authentication of the Mexican originals or the English translations. The documents purportedly include the police record of Sanchez’s arrest, a physical description of Sanchez, an order from a Mexican judge outlining Sanchez’s restriction, and the Mexican laws Sanchez purportedly broke. Even if these documents were admissible,³ the court did not need to believe it. There is

³ There was no objection to the evidence when it was presented.

zero evidence indicating whether or for how long the detention would prevent Sanchez from appearing, when the purported Mexican court hearing would take place, or whether Mexican officials would have allowed an extradition. The court could have reasonably found that Surety failed to meet even the lowest burden of proof. The court could reasonably reject such flimsy, unauthenticated, hearsay evidence.

2. The Court Could Have Reasonably Found That Sanchez's Flight Caused His Absence

The record suggests that Sanchez was absent from court due to his voluntary flight, not the acts of Mexican authorities. Unlike *United Bonding*, Sanchez was never brought to the border, with only the Mexican restriction preventing him from appearing. (See *United Bonding*, *supra*, 12 Cal.App.3d at p. 352.) Unlike *American Surety*, Sanchez was not expelled from the United States; he left voluntarily. (See *American Surety*, *supra*, 77 Cal.App.4th at p. 1065.) Further, like in *Ranger* and *Maga*, Sanchez made a voluntary escape from the United States. (See *Ranger*, *supra*, 48 Cal.App.4th at p. 996, *Maga*, *supra*, 97 Cal.App. at p. 691.) "Such risks were present when surety posted bond." (*Ranger*, *supra*, 48 Cal.App.4th at p. 996.)

Only after his flight did the operation of some law act as a contributing factor toward preventing his appearance. Thus, the court could have fairly found that Sanchez did not satisfy the "based upon" requirement of section 1305(e)(2), and was therefore not entitled to a tolling of the forfeiture period.

Surety Is Not Entitled to Equitable Tolling and Provides an Inadequate Record on Appeal

Surety asserts that, if it does not meet the statutory requirements for temporary disability tolling, then the court should have granted tolling on equitable grounds. To support this assertion, Surety contends that the Legislature intended to toll the forfeiture period when the prosecutor elects to seek extradition, as evidenced by

section 1305, subdivisions (f) & (g), as well as a vetoed amendment providing for such a tolling. Surety reasons that, because the Legislature proposed, and ultimately failed to pass, an amendment providing for tolling when defendant is in custody outside the court's jurisdiction and the prosecutor seeks extradition, the Legislature intended for a tolling in such situations. Surety asserts, therefore, that the court should have used its equitable power to create the tolling remedy the Legislature almost created.

It appears here that the statutory scheme already affords sureties a remedy if the prosecutor elects to extradite a defendant who is detained outside the court's jurisdiction. If a defendant meets the temporary disability provision in section 1305(e), the tolling remedy allows as much time as is needed for the prosecutor to extradite the defendant, without running out the forfeiture period. It appears the statute envisions a scenario where a defendant is held outside the jurisdiction, and extra time is needed to allow a prosecutor to seek extradition. Surety's problem here is not that Sanchez fell into a situation beyond the statute's current scope; it is that he failed to meet the statute's temporary disability provision, which *does* encompass this type of situation, but imposes limits on when the remedy is available. The Legislature has defined the circumstances necessary to toll the forfeiture period, and Surety has not satisfied that definition. We decline to extend the current statute to embody the Legislature's intent when enacting a *failed* amendment to the statute. Thus, there is no need here to craft an equitable tolling remedy, where the statute already defines when to toll the forfeiture period.

Even if we did search beyond the statute for an equitable remedy, we could not reach the merits here because Surety has failed to provide an adequate record on appeal. Although the minute order shows that the August 17, 2009 hearing was reported, appellant has proceeded without a reporter's transcript. "It is well settled, of course, that a party challenging a judgment has the burden of showing reversible error by an adequate record." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) Where the appellant provides an inadequate record, we may refuse to decide the merits of the issue. (*Id.* at p. 575.)

Here, a reporter’s transcript would have been crucial, because Surety asserts the court should have granted equitable tolling. Without the transcript, we are unable to determine on what grounds the court denied relief. We are without a basis to determine how the court weighed the arguments for and against equitable relief, or if it weighed them at all. Perhaps, for example, the court denied equitable tolling on the reasonable ground that the Surety failed to meet section 1305, subdivision (f) or (g), which are the only relevant provisions in the statute that direct the court to find “terms that are just.” Perhaps also, the court declined to provide an equitable remedy on the equally rational ground that section 1305(e) already affords a tolling remedy; perhaps it found no need to unearth the intent of a vetoed amendment in order to craft an additional tolling remedy. However, Surety leaves us without any means to determine which, if any, of the above grounds was a basis for the decision it now appeals, and we therefore decline to decide the merits of the issue.

DISPOSITION

The judgment is affirmed. The People are awarded costs on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O’LEARY, J.